SUPREME COURT OF THE UNITED STATES

PAUL DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, PETITIONER
v. FREDERICK LASHLEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92–409. Decided March 8, 1993

PER CURIAM.*

I

Respondent Frederick Lashley brutally beat and stabbed to death his 55-year-old, physically impaired cousin and foster mother, Janie Tracy, in the course of robbing her. An adult in the eyes of Missouri law at age 17, Lashley was convicted of capital murder, Mo. Rev. Stat. §565.001 (1978) (repealed Oct. 1, 1984), and sentenced to death. At a conference preceding the penalty phase of the trial, one of Lashley's attorneys asked the judge to instruct the jury on the mitigating circumstance that "[t]he defendant ha[d] no significant history of prior criminal activity," Mo. Rev. Stat. §565.012.3(1) (1978) (current version Mo. Rev. Stat. §565.032.3(1) (Supp. 1991)). App. to Pet. for Cert. A–86 to A–87. Defense counsel sought this instruction even though she repeatedly asserted that she would not try to show that Lashley lacked a criminal past. *Id.*, at A–84, A–86. At the same time, she moved for an order prohibiting the State from cross-examining defense witnesses as to Lashley's juvenile record. *Id.*, at A–83, A–84. Such questioning may not have been permissible under Missouri law. See Mo. Rev. Stat. §211.271 (1986). In any

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*JUSTICE SOUTER joins only Part I of this opinion.

event, the judge did not expressly rule on the latter motion. See *Lashley* v. *Armontrout*, 957 F. 2d 1495, 1501, n. 1 (1992) ("[T]he trial court was not called upon to rule in respect to the admissibility of defendant's juvenile record"). The judge did indicate, however, that Lashley would not be entitled to the requested instruction without supporting evidence. App. to Pet. for Cert. A–84, A–87.

Perhaps Lashley's attorneys chose not to make the necessary proffer because they feared that the prosecutor would be permitted to respond with evidence that Lashley had engaged in criminal activity as a juvenile. One of the attorneys so testified in a state collateral proceeding. Tr. 29 (Apr. 10, 1985). Or perhaps defense counsel sought to avoid opening the door to evidence that Lashley had committed other crimes as an adult. As the Missouri Supreme Court observed, the record indicates that, following his arrest, Lashley confessed to committing several other crimes after attaining adult status.† *State* v. *Lashley*, 667 S. W. 2d 712, 716 (Mo.), cert. denied, 469 U. S. 873 (1984); see also 677 S. W. 2d, at 717 (Blackmar, J., concurring in part and dissenting in part).

Whatever their reasons, Lashley's lawyers presented no proof that he lacked a significant criminal history. Nor did the prosecutor submit any evidence that would support

†At the guilt phase of the trial, defense counsel moved to exclude "some confessions regarding 7 other crimes," including burglary, robbery and stealing. Tr. 425 (Jan. 27, 1982). The motion was made not on the ground that the crimes were connected to the charged offense, cf. *post*, at 1, or that they were committed while Lashley was a juvenile, but because they were "extremely prejudicial" and "[ir]relevant" to Lashley's guilt or innocence of the murder. Motion *in Limine*, Record 143 (Jan. 21, 1982). In a pre-trial conference, defense counsel specifically stated that at least one of the crimes had been committed "a week or two" before the murder—that is, when Lashley was already an adult. Tr. 425 (Jan. 27, 1982). The presentence report contains additional evidence. Under the heading "Adult Arrest Record," the report indicates that Lashley was arrested for three offenses (robbery, burglary, and stealing) the day after his arrest for the present crime. Missouri Dept. of Social Services, Div. of Probation and Parole 2 (March 23, 1982).

the mitigating circumstance. The trial judge refused to give the jury the "no significant history of prior criminal activity" instruction. The Missouri Supreme Court affirmed. It reasoned that Missouri law requires mitigating circumstance instructions to be supported by some evidence, see, *e.g.*, *State* v. *Battle*, 661 S. W. 2d 487, 492 (Mo. 1983), cert. denied, 466 U. S. 993 (1984); see also *State* v. *Williams*, 652 S. W. 2d 102, 114 (Mo. 1983), and none was offered here. *State* v. *Lashley*, *supra*, at 715–716.

Lashley filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. He alleged that the trial judge's failure to give the requested instruction violated due process. The District Court dismissed the claim. *Lashley* v. *Armontrout*, No. 87–897C(2) (ED Mo., June 9, 1988). A divided panel of the Court of Appeals for the Eighth Circuit, however, granted relief. *Lashley* v. *Armontrout*, 957 F. 2d 1495 (1992). The Court of Appeals thought that the trial judge's ruling violated the Eighth Amendment under *Lockett* v. *Ohio*, 438 U. S. 586 (1978). In the majority's view, "*Lockett* requires the State—which is in a peculiarly advantageous position to show a significant prior criminal history, if indeed Lashley has such a history—to come forward with evidence, or else the court must tell the jury it may consider the requested mitigating circumstance." 957 F. 2d, at 1502. The court held that "the lack of any evidence whatever of Lashley's prior criminal activity entitled [him] to the requested instruction." *Ibid.*

As Judge Fagg explained in dissent, see *id.*, at 1502–1504, the majority plainly misread our precedents. We have held that the sentencer must be allowed to consider in mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death." *Lockett*, *supra*, at 604 (plurality opinion) (emphasis added). Accord, *Penry* v. *Lynaugh*, 492 U. S. 302, 317 (1989); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110

(1982); see also *Penry*, *supra*, at 327 ("[S]o long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence *introduced by a defendant*" (emphasis added)). But we never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence.

On the contrary, we have said that to comply with due process state courts need give jury instructions in capital cases only if the evidence so warrants. See *Hopper* v. *Evans*, 456 U. S. 605, 611 (1982). And, answering a question expressly reserved in *Lockett*, we recently made clear that a State may require the defendant "'to bear the risk of nonpersuasion as to the existence of mitigating circumstances.'" *Walton* v. *Arizona*, 497 U. S. 639, 650 (1990) (plurality opinion) (quoting *Lockett*, *supra*, at 609, n. 16); see also 497 U. S., at 669–673 (SCALIA, J., concurring in part and concurring in judgment) (rejecting *Lockett*). In *Walton* we rejected a challenge to a state statute that imposed on capital defendants the burden of establishing the existence of mitigating circumstances by a preponderance of the evidence—a higher evidentiary standard, we note, than Missouri has adopted. Discerning no "constitutional imperative . . . that would require the [sentencer] to consider the mitigating circumstances claimed by a defendant unless the State negated them," 497 U. S., at 650, we concluded that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden . . . to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency," *ibid.*

Even prior to *Walton*, other lower courts rejected arguments similar to Lashley's. For example, in *State* v. *Fullwood*, 323 N. C. 371, 373 S. E. 2d 518 (1988), vacated and remanded on other grounds, 494 U. S. 1022 (1990),

the court held that the trial judge did not err by refusing to submit to the jury a "no significant history of prior criminal activity" instruction where neither the defendant nor the State introduced evidence to support it. 323 N. C., at 394, 373 S. E. 2d, at 532; see also *Hutchins* v. *Garrison*, 724 F. 2d 1425, 1436–1437 (CA4 1983) (where defendant did not request a criminal history mitigating instruction and the record did not support it, any error resulting from failure to give the instruction was an error of state law only), cert. denied, 464 U. S. 1065 (1984). In *DeLuna* v. *Lynaugh*, 890 F. 2d 720 (CA5 1989), the Fifth Circuit held that a capital defendant was not entitled to a mitigating instruction under *Penry* because he had made a "tactical decision" not to introduce supporting evidence that would have "opened the door to the introduction in evidence of a prior criminal record." 890 F. 2d, at 722. Accord, *May* v. *Collins*, 904 F. 2d 228, 232 (CA5 1990), cert. denied, 498 U. S. 1055 (1991).

In short, until the Court of Appeals' decision in this case, it appears that lower courts consistently applied the principles established by *Lockett* and its progeny. Today we make explicit the clear implication of our precedents: Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them. Because the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction.

We are not persuaded by the Court of Appeals' assertion that the State was uniquely situated to prove whether or not Lashley had a significant prior criminal history. As an initial matter, Missouri law does not demand *proof* that a mitigating circumstance exists; it requires only some supporting evidence. Lashley acknowledged in his federal habeas petition that his attorneys could have put forward some evidence that he lacked a significant prior criminal history; indeed, he contended that they were constitutionally ineffective for failing to do so. App. to Pet. for Cert. A–71. There is no reason to suppose, as the

dissent suggests, *post*, at 9, that Lashley would be required to testify in order to receive the mitigating instruction. Before the state trial court, the prosecution submitted that testimony by Lashley's acquaintances would suffice. App. to Pet. for Cert. A–83. On these facts, we cannot say that the State unfairly required Lashley to prove a negative.

Nor are we convinced that, as a general rule, States are better positioned than criminal defendants to adduce evidence of the defendants' own criminal history. While the prosecution may have ready access to records of crimes committed within its own jurisdiction, the same may not be true when the defendant has committed crimes in other jurisdictions, perhaps over a period of many years. And any presentence report that is created is available to both the government and the defense. In this case, Lashley has not suggested that he was unable to offer his presentence report as evidence that his prior criminal record was insignificant. Moreover, the statutory mitigating circumstance refers not to arrests or convictions, but more broadly to "criminal activity." To the extent that this includes criminal conduct that has not resulted in formal charges, no one is better able than the defendant to make the required proffer.

II

The dissent contends that this case is not about the requirements of *Lockett* at all, but about the "presumption of innocence." *Post*, at 2. The question the dissent raises is indeed "novel," *ibid.;* it apparently was not raised in either the District Court or the Court of Appeals, and it was not presented to this Court. Nor does the dissent's argument compel a different result. To be sure, we have said that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976). The presumption operates at the guilt phase of a trial to remind the jury

that the State has the burden of establishing every element of the offense beyond a reasonable doubt. *Taylor* v. *Kentucky*, 436 U. S. 478, 484, n. 12 (1978). But even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense. *Kentucky* v. *Whorton*, 441 U. S. 786, 789 (1979) *(per curiam)*. An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a "'genuine danger'" that the jury will convict based on something other than the State's lawful evidence, proved beyond a reasonable doubt. *Ibid.* (quoting *Taylor, supra*, at 488).

Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears. See *Herrera* v. *Collins*, 506 U. S. ___, ___ (slip op., at 8) (1993); *id.*, at ___ (slip op., at 15) (Blackmun, J., dissenting). We have not considered previously whether a presumption that the defendant is innocent of other crimes attaches at the sentencing phase. But even assuming that such a presumption does attach, Lashley was not entitled to a "presumption of innocence" instruction. Under our precedents, the instruction would have been constitutionally required only if the circumstances created a genuine risk that the jury would conclude, from factors other than the State's evidence, that the defendant had committed other crimes. See, *e.g.*, *Whorton, supra*, at 788–789. Lashley does not contend that any such circumstances existed in this case. As the dissent acknowledges, *post*, at 2, the record before the jury was completely silent on the question whether Lashley had committed prior offenses. The jury was specifically instructed that the State had the burden of proving the existence of any aggravating circumstances "beyond a reasonable doubt." Instructions Nos. 20–21, Record 77, 79 (Jan. 29, 1982). Nothing disturbed the presumption that Lashley was a first offender.

The "circumstances" on which the dissent relies, *post*, at 5–6, had no bearing on the jurors' perceptions. Lashley's age and the sentence to which he was subject

were irrelevant to the question whether the jury might conclude improperly that he was a repeat offender. The dissent assigns special weight to the fact that defense counsel may have decided not to introduce evidence concerning Lashley's prior criminal history for fear that the State would introduce Lashley's juvenile record. We note that, had the trial court improperly admitted evidence of Lashley's juvenile record, defense counsel could have objected and preserved the issue for appeal. In any event, the only impact that defense counsel's decision not to make the necessary proffer could have had on the *jury* was to deprive it of possible testimony that Lashley lacked a criminal history. Without such testimony, the record before the jury was still silent on the question of Lashley's criminal past. Thus, assuming *arguendo* that a presumption of innocence did attach at Lashley's sentencing, under *Whorton* he was not constitutionally entitled to a "presumption of innocence" instruction.

Lashley's motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals is reversed.

It is so ordered.